

Date: May 24, 1996

Case No. 93-SDW-1

In the Matter of

JOHN W. MARTIN,  
Complainant,

v.

THE DEPARTMENT OF THE ARMY,  
Respondent.

Appearances by: H. Wesley Kirkland, Esq,  
for Complainant  
L. Patricia Smith, Esq.  
for Respondent

Before: Fletcher E. Campbell, Jr.  
Administrative Law Judge

RECOMMENDED DECISION AND ORDER ON REMAND

This matter comes before me on remand from the Secretary of Labor. Complainant, John W. Martin, has alleged unlawful discrimination against his former employer, the Department of the Army, under the employee protection provisions of the Safe Drinking Water Act, 42 U.S.C. 300j-9(i). In a recommended decision and order issued on December 22, 1993, Administrative Law Judge Theodor von Brand recommended that the complaint be dismissed. However, in an order issued July 13, 1995, the Secretary disagreed, finding that Respondent unlawfully discriminated against Complainant by

removing him from the backflow preventer/test inspector position and by downgrading him on a performance appraisal. However, because Complainant acknowledged having left the Army's employ, the Secretary found that an order reinstating him to his former position may not be appropriate.

Therefore, the Secretary remanded the case for a determination of whether Mr. Martin was constructively discharged, i.e., "whether working conditions were rendered so difficult, unpleasant, unattractive, or unsafe that a reasonable person would have felt compelled to resign" (slip op. at 8). Further, Respondent was ordered to upgrade Complainant's September 1992 performance appraisal. Finally, the Secretary ordered the Administrative Law Judge to assess any costs, expenses, and backpay due Complainant.

As Judge von Brand has retired, the case was assigned to me to carry out the Secretary's remand order.

A hearing was held on the issue of constructive discharge at Ft. Jackson, South Carolina on November 6-7, 1995, at which both parties were provided a full opportunity to present evidence and argument as provided in Department of Labor regulations, 29 C.F.R. part 24. The findings and recommendations which follow are based on a complete review of the record generated at both the 1993 and 1995 hearings.

#### FINDINGS OF FACT

The testimony adduced at the hearing on remand can be summarized as follows:

##### A. Testimony of Complainant John W. Martin:

Complainant testified that he had begun experiencing stress and had become depressed, having trouble sleeping, prior to his becoming a whistleblower (Tr. 22-3).<sup>1</sup> This

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<sup>1</sup>The following are references to the transcript:

CX - Complainant's exhibits

AX - Agency's (Respondent's) Exhibits

Tr.- Transcript of the hearing on remand

stress, depression and insomnia were due to the pressure he believes he was under to pass Ft. Jackson's backflow prevention program illegally. In fact, on September 3, 1991, the day before he went to the Inspector General (IG), Mr. Martin sought treatment for stress at Moncrief Hospital (Tr. 22).

After he did report problems with the backflow prevention program, Mr. Martin's stress level became even more severe because he knew that his supervisors and co-workers would find out who was responsible for reporting the problems (Tr. 23).

After going "out of the chain of command," Complainant began receiving harassing hang-up telephone calls at home (Tr. 26, 36). Further, Mr. Pittman, his supervisor, confronted him and told him that "he was going to run me off, degrade me, or get rid of me any way he could, that I might as well find another job...." (Tr. 27).

Next, Mr. Martin was suddenly ordered to do other extra work, such as inspecting buildings, which kept him from the backflow program and slowed his progress in carrying out that program (Tr. 23-4).

Then, too, after the investigation by the IG and the state of South Carolina began, Mr. Martin suddenly found himself working for three supervisors all at the same time (Tr. 25-6), an unusual situation. Then, his co-workers, including Pittman, disapproving his actions, became hostile (Tr. 36, 27, 43). Pittman refused to grant Complainant any assistance with the backflow program (Tr. 30-1). Pittman also ordered Mr. Martin to evaluate his own performance rating and his own suggestion (Tr. 31-2). When Mr. Martin refused to evaluate his own performance rating and his own suggestion, Pittman removed him from the backflow program, saying that he had "messed up again" (Tr. 35).

After this, Mr. Martin was reassigned to do general plumbing work, which entailed much less responsibility (Tr. 33-4). As the Secretary has found, he was also given a lower performance rating, which made it more likely that he would be RIFed (laid off)(Tr. 35).

Complainant was a subject of perceived harassment from Mr. Pittman concerning the fact that Martin had disconnected his telephone (Tr. 37-8). Then, the gas light on his truck was cut near the open end of the exhaust pipe, causing a major fuel spill and requiring that the fire department be called to contain the spill (Tr. 47).

Complainant resigned his job in May of 1994, because, he said, he had major depression from work, "with the bills adding on top of it and the financial problems from being out of work -- sick so much...." (Tr. 45).

In addition, Pittman vented anger at Martin for requesting a mask to protect him from sulphuric acid, which, as a plumber, he would use to unstop drains. At the time, he was having trouble with bronchitis (Tr. 46-7).

On cross examination, Mr. Martin said he had had at least five jobs since leaving Ft. Jackson. However, in most cases, he could work only a short period of time because he was having trouble functioning as a result of psychological difficulties, some of which related to his job at Ft. Jackson (Tr. 54-9).

Before he left Ft. Jackson, Mr. Martin had to file for bankruptcy (Chapter 13) as a result of being behind on bills. This adversely affected his self esteem. It was not the first time he had filed for bankruptcy (Tr. 59-60).

Complainant was initially discharged from the Army in 1976 when, after working 42 straight hours pouring concrete, he had hallucinated, believing that he was about to be killed. He was hospitalized for psychiatric problems then and has been hospitalized since for drug dependency (Tr. 63, 65). Complainant is a recovering alcoholic, whose last drink was on January 1, 1995 (Tr. 68).

On any given day, Martin had at least four supervisors in his "chain of command," at least on paper (Tr. 72).

Mr. Pittman and Mr. McDonald lied about Complainant at the hearing (Tr. 85-6).

Getting into financial trouble in 1993 was caused by being out sick and using up sick leave (Tr. 96). Being out of work in 1993 and 1994 was due mostly to the stress he was encountering (Tr. 97).

Some of the people in Complainant's shop, including Charlie Pittman, were aware of Claimant's mental illness, but he generally tried to keep it quiet (Tr. 97). When he first came to work, Complainant made sure that the Army knew that he was 50% disabled retired as a result of a nervous condition (Tr. 101).

#### B. Testimony of Herma Martin

Ms. Martin, Complainant's wife, testified that her husband was "messed up" after the 1993 hearing (Tr. 106). He was worried about being sent into a building with asbestos in it. Charlie Pittman gave him dirty looks. All of this made him nervous, and he just stayed to himself (Tr. 106). Their marital relationship after the hearing was bad, and they separated (Id.).

Ms. Martin testified that her husband had to watch over his shoulder all the time. People were throwing things at him, and his truck was involved in an incident involving fire (Tr. 107).

Ms. Martin testified that she and her husband had had financial difficulties prior to 1991 (Tr. 109-10).

#### C. Testimony of Richard McDonald

Mr. McDonald, a work leader in the Directorate of Public Works, O&M Division, Utilities Branch, Plumbing Shop, was previously a work leader. He is the AFGE local union president (Tr. 120-1). During the time he was in the plumbing shop, Mr. Martin came to Mr. McDonald with grievances against Mr. Pittman. Mr. McDonald believes that Mr. Pittman, who is Mr. McDonald's first line supervisor, is the fairest supervisor he has ever worked for (Tr. 124). Pittman was very friendly toward Martin during incidents

which McDonald observed (Tr. 127). According to McDonald, Charlie Pittman is harder on fellow blacks than he is on whites who work for him (Tr. 137). Mr. McDonald stated that he could understand why Mr. Martin might have thought that there was a hostile atmosphere at Ft. Jackson after the hearing took place in early 1993 (Tr. 142). Probably a few people in the shop were discriminating against Mr. Martin as a result of the hearing (Tr. 143).

D. Testimony of George Klingbeil

Mr. Klingbeil, a plumber in Mr. Martin's former organization, testified at the previous (1993) hearing. He did not notice any difference in the treatment that Pittman was giving Martin as compared to Pittman's treatment of any other employee in the office. Further, he did not notice Mr. Pittman harassing Mr. Martin in any way (Tr. 145). His shop, like most shops, is like an army unit in that all of the employees stick together, exhibiting loyalty to each other (Tr. 148). When "somebody bucks the system, for a while they would be kind of put on the side" (Tr. 149). Mr. Klingbeil is loyal to Charlie Pittman and would help him with any kind of work at all (Tr. 151). However, he would not lie for him (Id.).

E. Testimony of David Anderson

David Anderson, W9 work leader, worked with Martin and Pittman for many years. He never witnessed Pittman harassing Martin or discriminating against him (Tr. 153-4).

F. Testimony of Betty Jeffcoat

Ms. Jeffcoat is a labor relations specialist at the civilian personnel office at Ft. Jackson and has been since 1980 (Tr. 157). Ms. Jeffcoat testified extensively about agency policy concerning advancement of sick leave and the fact that Mr. Martin was at length denied advance sick leave for reasons that she considered justified. She also discussed the performance rating system (Tr. 157-76). She

acknowledged that it is not unusual for a depressed employee to miss a lot of work (Tr. 179). However, she testified that it would be the employee's responsibility to provide documentation of his medical condition to his supervisor (Tr. 179).

G. Testimony of Charlie Robert Pittman, Jr.

Mr. Pittman was Mr. Martin's immediate supervisor during all relevant times. After the 1993 hearing, Mr. Pittman did not harass Mr. Martin or treat him differently from any other person under his supervision (Tr. 190). Nor did he notice any other person treating Mr. Martin differently (Id.). After the March 1993 hearing, Mr. Martin became quieter and did not mix with the other men as much (Tr. 191). When Mr. Martin used up his accrued sick leave and borrowed an excessive amount of it, Mr. Pittman felt that he had no choice but to deny any further advance of sick leave (Tr. 195-200).

Because it is office policy that the possibility of emergencies require that employees have telephones, he met with Mr. Martin to inform him that he needed a phone (Tr. 207-8). He never harassed Martin about not having a phone. Mr. Martin never complained to Pittman about Pittman giving him dirty looks (Tr. 208). Pittman does not recall Mr. Martin ever asking for a mask in order to avoid breathing sulphuric acid fumes (Tr. 208-9).

On cross-examination, Mr. Pittman denied that he had ever misrepresented anything to the South Carolina state authorities (Tr. 212). Mr. Pittman acknowledged that Mr. Martin did good work (Tr. 216). Since the 1993 hearing, no disciplinary action has been taken against Mr. Pittman or anyone in his shop relating to discrimination against Mr. Martin (Tr. 220).

One of the reasons why Pittman took Martin off the backflow job was because he went outside the "chain of command" (Tr. 222). Mr. Pittman never heard about any incident involving damage to Mr. Martin's vehicle (Tr. 224).

Had there been such an incident, the MPs would have been called (Tr. 225).

#### H. Testimony of William Munn

Mr. Munn was Chief of Maintenance Branch for the Directorate of Public Works. He was the second-line supervisor of Mr. Martin. Prior to and after the hearing, Mr. Martin was rarely at work (Tr. 228). He had a conversation with Mr. Pittman concerning Mr. Martin's sick leave. In that conversation, Munn stated that, just like everyone else, if Mr. Martin wanted sick leave, he had to put it in writing and have the supervisor approve it (Tr. 229).

#### I. Testimony of Franklin D. Cooper, Jr.

Mr. Cooper is Chief of Operations and Maintenance Division in the Directorate of Public Works at Ft. Jackson, a position he held from 1991 through 1994 (Tr. 234). In this capacity, he was Mr. Martin's third-line supervisor and Mr. Pittman's second-line supervisor (Tr. 235). On one occasion, Martin came to Cooper asking for additional sick leave loans. He notes that people who have been with the government a number of years usually have significant accumulated sick leave. If not, it may indicate a track record of abuse of sick leave (Tr. 236-7). When he took over the division in January of 1990, he noted that there were probably half-a-dozen employees who did not have very much sick leave considering their number of years of service. Mr. Martin was one of these (Tr. 237).

When Mr. Martin quit, he brought his resignation to Mr. Cooper.

The pressure based on the work load in Mr. Martin's shop increased greatly between 1990 and 1994. The same is true of the plumbing shop (Tr. 238-9).

On cross-examination, Mr. Cooper testified that, as a result of the Army's agreement with DHEC (South Carolina



Department of Health and Environmental Control) regarding the backflow program, and as a result also of increasingly tight budgets, employees are having to be more productive at work than ever before (Tr. 247). Further, it is clear that the impetus for the agreement with DHEC came from work done by Mr. Martin (Tr. 250).

J. Rebuttal Testimony of John W. Martin

Complainant further described the incident involving the gas-tank rupture in his truck. He had parked the truck behind the plumbing shop to pick up some materials when he smelled gasoline and noticed a large puddle of gasoline around the back (Tr. 256). Underneath the truck, he observed a cut right above the tail pipe (Id.). Then he called the fire department to contain the spill and ensure that there was no fire (Id.). The fire department arrived and cleaned up the spill (Id.). He is sure that the fire department logged the incident (Id.). Complainant did not call the MPs (Id.). The truck in question was assigned to Complainant every day, a fact that his colleagues would have known (Tr. 257). He saw no one acting suspicious around the truck (Id.). He did not report the incident to anyone in DPW (Id.). He did tell some coworkers about the incident and questioned Bob Jenkins about it, he believes. He also told his wife about it (Id.).

As to the harassing phone calls, they were "pretty frequent" (Tr. 257). Sometimes he would get four or five a day, some coming late at night, even after midnight (Tr. 257-8). They were hang-up phone calls (Tr. 258), which persisted for three or four months after the 1993 hearing (Tr. 258). The calls only stopped when he had the phone disconnected (Tr. 259). Complainant suspected that the origin of the phone calls was a coworker because of another Ft. Jackson whistleblower whose wife received harassing calls (Tr. 260). On cross examination, Complainant said that his telephone number had been unlisted but that it was

posted in his workshop so that anyone there could have obtained it (Tr. 265).

The other whistleblower identified as a person who either made or received (it is unclear which) some anonymous phone calls was named Hildreath, who worked for Eddy Endfinger in kitchen equipment (Tr. 260-1, 267-8).

### DISCUSSION

I conclude that working conditions were rendered so difficult, unpleasant, unattractive, or unsafe that a reasonable person would have felt compelled to resign (Decision and Order of Remand at 8). The Secretary has already found that Respondent unlawfully discriminated against Complainant by removing him from the backflow-preventer-tester/inspector position and by downgrading him on his performance appraisal. These factors were important in rendering his job difficult, unpleasant, and unattractive. In addition, I find that Complainant was socially ostracized by his fellow employees as he and his wife allege (Tr. 36-7, 43, 106-7). At least two co-workers, McDonald (Tr. 142) and Klingbeil (Tr. 149), confirm this.

Testimony to the contrary by Pittman and others is not believable. Even Pittman acknowledges that Complainant kept to himself after the 1993 hearing (Tr. 191). Pittman simply fails to consider that this might have been a result of ostracism by his fellow employees. I find that Pittman's obvious bias in addition to his inability to observe all that went on render his contrary testimony less credible. A witness supporting Pittman, David Anderson, likewise had limited opportunities to observe Complainant (Tr. 154). Pittman may believe that he did not treat Martin differently after Martin became a whistleblower, but the evidence, even apart from Claimant's testimony and that of Ms. Martin,

indicates that he did even though I regard some of Martin's allegations of harassment as unproved.<sup>2</sup>

Also, the fact that Complainant was suddenly actively supervised by three people in his chain of command must have increased the pressure on him (Tr. 25-6). Although it may not be unusual for a person in Martin's organization to have a number of supervisors, it was unusual that all of them suddenly began active supervision of him (Tr. 26, 72).

I am also mindful of the fact that Complainant had a history of mental illness, including stress and depression (Tr. 61-5, 95). This must be considered in any evaluation of evidence on the subject of the difficulty and/or unpleasantness of the job. Assuming Complainant to be a "reasonable person" (Johnson v. Dominion Security, 86 CWA 3 Sec. dec., May 29, 1991, slip op. at 19-22) does not mean that he must be assumed to be a normal healthy person. Indeed, an employer must take an employee as it finds him - here as a reasonable person who has a history of suffering from stress and depression. Although there is no medical testimony of record, it is fair to conclude that a person who is mentally ill will, when socially ostracized and otherwise discriminated against on the job, have a lower tolerance for difficult, unpleasant, unattractive or unsafe conditions on the job.

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<sup>2</sup>Where I have not discussed a specific incident or event testified to by Mr. Martin, I find that the incident has not been proven to have occurred or is relatively unimportant. Because of 1) mutual hard feelings, 2) lack of corroboration of their testimony, and 3) a history of dubious statements by both (i.e., testimony by Martin about the gas leak and statements by Pittman to DHEC that all Ft. Jackson backflows had passed tests (1993 hearing, Tr. at 250)), I find that neither Mr. Pittman nor Mr. Martin is a very credible witness. As Martin bears the burden of persuasion, I find against him concerning the occurrence and/or importance of these incidents.

In addition, some events which made Mr. Martin's job less pleasant and attractive cannot be attributed to harassment or discrimination - e.g., the increased office workload (Tr. 238-9), the admonition about the telephone disconnection (Tr. 207-8), and the failure to advance sick leave (Tr. 195-200).

In any case, whether or not his pre-existing condition is considered, I find that Complainant's working conditions were rendered so difficult, unpleasant, unattractive or unsafe that a reasonable person would have felt compelled to resign.

I should address the important question of whether or not Complainant has shown that he was the subject of harassing hang-up phone calls, which, he testified at length, he was (Tr. 256-60). He compared these phone calls in a very vague fashion to phone calls made in connection with another alleged whistleblower (Tr. 267-8).<sup>3</sup> These phone calls to Martin are not verified. Despite the fact that Complainant and his wife were living together with their little girl, Ms. Martin did not even mention the calls, which supposedly occurred three to four times a night over a four-to-five month period, in her testimony and was not asked about them. Complainant acknowledges that he did not report the calls to the phone company, the police, or his supervisors (Tr. 269-70). In fact, no witness confirmed the phone calls at all. In addition, Complainant never disconnected his phone until he became financially hard pressed (Tr. 265). This being the case, I find that the harassing phone call allegation is unproved.<sup>4</sup>

As to the gas leak incident, this is also suspicious even though the report of the incident is confirmed (but only via the hearsay testimony of Complainant's wife) (Tr. 107). Respondent has offered two affidavits demonstrating the absence of any record in the Ft. Jackson Fire Department log books that correspond to the incident described by Mr. Martin, who identified the incident as occurring at night in

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<sup>3</sup>Respondent has submitted an affidavit from a coworker of the alleged whistleblower. According to this affidavit (which I designate as AX 48 and admit in evidence), there is no indication that the person in question was ever engaged in environmental whistleblowing, merely social gossip.

<sup>4</sup>It is also true that there is no direct evidence of the origin of these calls, if they were real, as no one spoke at the other end, and the calls were not traced. However, no one has suggested that anyone other than Martin's coworkers had a motive to harass him.

the summer of 1993 (Tr. 259). Complainant testified that the Fire Department responded and that this would be reflected in the Department's log (Tr. 256). Hence, as with the phone calls, I find that Complainant has not shown that the truck gas-leak incident actually occurred.<sup>5</sup>

For the reasons stated above, I find that Complainant has shown by a preponderance of the evidence that his job was rendered so difficult, unpleasant, unattractive and unsafe that a reasonable person would have felt compelled to resign. I find that he has so shown whether or not the truck incident and/or the alleged harassing phone calls are found to have taken place and whether or not Complainant's pre-existing medical/psychological conditions are taken into consideration.

#### Upgraded Performance Appraisal

Respondent has submitted AX-45, which is Complainant's upgraded 1992 performance appraisal. The Secretary directed Respondent to provide this document.

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<sup>5</sup>Complainant objects to the affidavits of Mr. Moore and Mr. Cross on grounds that they are hearsay and because they are offered late. Over this objection I am admitting the two affidavits as AX 46 and AX 47 respectively. Complainant's objections are well taken in that AX 46 and 47 are indeed hearsay, but hearsay is not excluded in environmental whistleblower hearings within the jurisdiction of the Department of Labor. 29 C.F.R. part 24. As to Complainant's argument that this evidence could and should have been presented in the form of testimony at the hearing, whereas it is true that better trial preparation by Respondent would have disclosed the truck incident information by time of trial, I find that the importance of the evidence outweighs this consideration. Further, because I have no reason to believe that Fire Department log books are not open to the public by way of the Freedom of Information Act or otherwise, I conclude that Complainant could have examined the same records and presented contrary evidence had the affidavits inaccurately described log-book entries.

Costs, Expenses and Back Pay

The Secretary has asked me to assess costs, expenses and back pay due to Complainant. My assessment follows:

1. Medical treatment. Complainant's current medical bills total \$32,972.14. He requests a total of \$50,000 for past and future medical expenses. Past and future medical treatment expenses are allowable. De Ford v. Secretary of Labor, 700 F. 2d 281, 286 (6th Cir. 1983). However, I have no basis on which to attribute any of his medical and hospitalization expenses (CX 40-3) to the events giving rise to his constructive discharge. Some of the hospital expenses are undoubtedly attributable at least in part to his prior psychological condition, and some (HIV testing, antacid medications, a syphilis test, etc.) would seem to have no relation to stress or depression at all. Without expert medical testimony assisting me, I cannot perform an allocation so as to recommend an award for medical expenses.

2. Back pay. Back pay from May 1994 (the date of Complainant's resignation) until the present is computed as follows: \$11.82 per hour x 2080 hours x 2 years = \$49,171.20. Respondent has not advanced any different figure.

3. Front pay. "Front pay," to which Complainant is entitled by virtue of my finding that he was constructively discharged, should be calculated based on the assumption that Complainant would have worked for the Army without promotion (the likelihood of promotion being purely speculative, as Complainant adduced no evidence on the subject) until he reaches the age of 65, a convenient year of retirement. From June 1, 1996 until Complainant reaches 65 years of age, he would be entitled to \$11.82 per hour x 2080 hours x 22.25 years, which equals \$547,029.60. This money should become payable only as it is accrued and should be adjusted for inflation periodically. In addition, Complainant should continue to receive whatever benefits he was getting when he left civilian Army employment.

4. Bankruptcy costs. Costs of bankruptcy may be allowable if Complainant can show that bankruptcy was a result of the constructive discharge. In this case, the record demonstrates that Complainant's financial condition was caused by many factors, some of which may have included loss of pay due to harassment and discrimination (Tr. 45, 59-60, 96-7, 109-10). However, the record contains no basis for allocating the costs of bankruptcy to any causes. Much less does it include any documentation of such allocation. Therefore, I have no basis on which to make such an allocation. If Complainant can subsequently provide such a basis, in the form of medical and/or financial reports, he should submit them to the Secretary.

5. Attorney's fees. Complainant's attorney, H. Wesley Kirkland, Esq., has filed a petition asking for attorney's fees in the amount of \$5,050.00. I find this petition to be reasonable. The hourly rate of \$125.00 is reasonable,<sup>6</sup> arguments of the Army to the contrary notwithstanding. Also, time spent for a hearing may include actual time present, not only time on the record. Thus, I recommend approval of the attorney's fee petition as presented.

#### RECOMMENDATION

I recommend that the Secretary conclude that Complainant was constructively discharged and that Respondent be ordered to compensate Complainant as stated above for back and front pay and his attorney's fees. Claims for medical and

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<sup>6</sup>The 1994 Survey of Law Firm Economics, Altman Weil Pensa Publications, Inc., of which I take official notice (ALJ -1), indicates that, as of January 1, 1994, the standard hourly billing rate for partners in the South was \$134.00 per hour in the lower quartile and \$185.00 per hour in the upper quartile and for associates was \$90.00 per hour in the lower quartile and \$125 per hour in the upper quartile.

bankruptcy expenses should be denied unless documentation of a basis for allocation is provided.

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FLETCHER E. CAMPBELL, JR.  
ADMINISTRATIVE LAW JUDGE

FEC/lfrl  
Newport News, Virginia

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Secretary of Labor to the Office of Administrative Appeals, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. The Office of Administrative Appeals has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. See Fed. Reg. 13250 (1990).